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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92045000
Party	Defendant SPORTSMAN'S WAREHOUSE, INC. SPORTSMAN'S WAREHOUSE, INC. 7035 HIGH TECH DRIVE MIDVALE, UT 84047
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Attachments	basspro.PDF (5 pages)(133627 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Trademark Registration No. 2,390,988

For the Mark SPORTSMAN'S WAREHOUSE HUNTING FISHING CAMPING RELOADING
OUTERWEAR FOOTWEAR and DESIGN

Date registered: October 3, 2000

Bass Pro Trademarks, L.L.C.,

Petitioner,

Cancellation No. 92045000

v.

Sportsman's Warehouse, Inc.,

Respondent.

**SPORTSMAN'S WAREHOUSE, INC.'S OPPOSITION TO PETITIONER'S MOTION
FOR LEAVE TO FILE AMENDED PETITION FOR CANCELLATION**

I. INTRODUCTION

Respondent Sportsman's Warehouse, Inc. ("Sportsman's Warehouse") submits this Opposition to Petitioner Bass Pro Trademarks, L.L.C.'s ("Bass Pro") Motion for Leave to File Amended Petition for Cancellation. Bass Pro's motion should be denied for two reasons. First, the claims that Bass Pro wants to assert lack substantial merit. Second, Bass Pro's Amended Petition would cause prejudice because it brought the motion nearly at the close of discovery in this proceeding. Adding new claims at this date would cause substantial prejudice or delay to the timely resolution of this proceeding.

II. PETITIONER'S MOTION SHOULD BE DENIED.

A. The Proposed New Claims Lack Merit and Are Futile.

The Trademark Trial and Appeal Board will normally deny a motion for leave to amend where the pleading is legally insufficient or would serve no useful purposes. TBMP § 507.02. Petitioner claims that it filed this motion now because it had obtained the necessary information to support the purported new claims in discovery. An examination of Petitioner's proposed Amended Petition, however, makes it clear that Petitioner has not obtained the information in discovery. The proposed Amended Petition contains new allegations in paragraphs 6 through 9. Two of those paragraphs, 8 and 9, are based "upon information and belief," not any evidence obtained through discovery. Thus, Petitioner's claim that it has evidence obtained in discovery to support the new allegations is inaccurate.

Additionally, all of Petitioner's new claims relate to allegations of fraud. They claim that Sportsman's Warehouse identification of services is too broad, and also that Sportsman's Warehouse has misused the statutory registration ® symbol. Fraud claims are subject to Federal Rule of Civil Procedure 9, which requires that fraud be plead "with particularity." Paragraphs 8 and 9 of the proposed Amended Petition do not contain any particular facts, and thus do not meet the requirements of Rule 9.

Paragraphs 6 and 7 also should not be allowed. Petitioners asserting fraud claims have a heavy burden. Petitioner would have to prove that Sportsman's Warehouse acted in bad faith with a fraudulent purpose and an intent to secure a federal registration by deception. *Stocker v. General Conference Corp.*, 39 U.S.PQ.2d 1385 (TTAB 1996). Petitioner again claims that it only learned of information to support these claims during discovery, but none of the evidence it cites does anything to support these crucial elements of the claims. The discovery period is nearly closed, so it is unlikely that any additional evidence exists. Without any such evidence, the purported new claims have no chance of success. It would be unreasonable to allow

Petitioner to add the new claims and delay this proceeding where the evidence is plainly insufficient to support the claims.

B. Petitioner Unreasonably Delayed Asserting its New Claims.

The timing of a motion for leave to amend plays a large role in the Board's determination in whether the adverse party would be prejudiced by allowance of the amendment. TBMP § 507.02(a). A delay in filing the motion for leave to amend can render the amendment untimely. *Id.* Petitioner claims that this motion is timely because it filed the motion approximately one month after receiving Sportsman's Warehouse's discovery responses. Although this is true, Petitioner failed to inform the Board that it did not serve any discovery requests until January 2006 – even though the discovery period had opened months earlier, on October 28, 2005.

Petitioner claimed that it needed to conduct discovery so that it could bring these new claims, yet Petitioner waited nearly three months before conducting any discovery. If these claims were important to Petitioner, Petitioner should not have waited three months to conduct discovery. Now Petitioner is seeking to add these new claims, even though there is less than a month left in the discovery period. Under these circumstances, it is clear that Petitioner has unreasonably delayed and its motion should be denied.

The prejudice caused by Petitioner's delay cannot fully be remedied merely by an extension of the discovery schedule. As set forth above, even after conducting discovery, Petitioner still lacks any information regarding crucial elements of the claims that it is seeking to assert. Additional time for discovery would only cause the parties to incur time and expense on claims that lack merit.

Nevertheless, if the Board grants Petitioner's motion, an extension of the current discovery period is essential. *See* TBMP § 507.02(a). Currently, discovery closes on April 26,

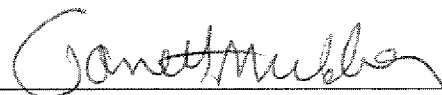
2006. If the discovery period is not extended, Sportsman's Warehouse would have no time to conduct any discovery on these new claims. Sportsman's Warehouse would require at least three additional months of discovery so that it could conduct written discovery and take depositions on the new claims.

III. CONCLUSION

For the reasons stated herein, Sportsman's Warehouse respectfully requests that the Board deny Petitioner's motion for leave to amend. In the alternative, Sportsman's Warehouse respectfully requests that if the Board grants the motion, that it also extend the discovery period by three months.

Dated: April 18, 2006

LINDQUIST & VENNUM P.L.L.P.

By: 

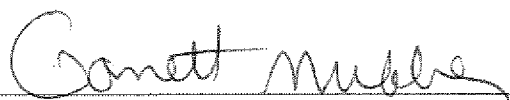
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**ATTORNEYS FOR RESPONDENT
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing **SPORTSMAN'S WAREHOUSE, INC.'S OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO FILE AMENDED PETITION FOR CANCELLATION** was served by U.S. Mail to counsel for Petitioner, Dennis J.M. Donahue III, Husch & Eppenberger, LLC, 190 Carondelet Plaza, Suite 600, St. Louis, MO 63105, this 18th day of April, 2006.



Garrett M. Weber